

seasonal usage spikes. Under this approach, if a holder of sensitive 800 numbers exercising a right of first refusal demonstrates that its annualized average monthly usage for the last year for all its sensitive 800 numbers equals or exceeds the Commission's usage threshold, that holder would not have to pay the fee.

b. Competitive Bidding -- The Notice suggests competitive bidding as an alternative to a one-time fee for a right of first refusal. NPRM at ¶ 41. The Coalition opposes competitive bidding because it is not a valid method for quantifying a right of first refusal fee. An auction is inconsistent with the concept of a right of first refusal. *By definition*, a right of first refusal gives the holder of an 800 number the first right to use the equivalent number in a 8YY SAC. Competitive bidding, by contrast, awards the number to the highest bidder. Users who can obtain an 888 number only by competing successfully in an auction do not have an effective right of first refusal. Indeed, an auction penalizes users who have invested in a number, because the higher such investment, the greater the value of the 8YY clones.

The Notice also requests comment on whether federal trademark law will be sufficient to protect sensitive 800 numbers. NPRM at ¶ 39. It does not. First, many users need to protect 800 numbers because they generate high calling volumes or the number sequence is significant to callers, not because the numbers have significant alphabetic mnemonic. Such numbers do not have -- and cannot get -- trademark protection. Second, it is not clear that trademark protection extends to sensitive toll-free numbers. While some courts have given

protection to the mnemonic accompanying a telephone number, the issue is not settled. The Second and Third Circuits, for example, disagree over the level of protection granted a mnemonic telephone number.¹⁶ The Patent and Trademark Office ("PTO") follows the Third Circuit's position¹⁷ and will not register a number as a trademark if the alpha-pneumonic equivalent spells a "generic" word. Finally, trademark protection does not address the misdial ("fat finger") problem - - protecting incumbent users from the lost business and new entrants from clogged lines due to misdialed calls.

Assignment Based on Industrial Classification -- The Notice seeks comment on the use of the Census Bureau's Standard Industrial Classification ("SIC") to ensure that equivalent number assignments in the 800 and 888 SACs are not made to competing users. NPRM at ¶ 45. Although in concept this might protect 800 holders from fraud and unfair competition, in practice it is unworkable.

SIC codes are both over- and under-inclusive. On one hand, the SIC code classification system groups non-competing companies together. On the other hand, companies that compete do not always have the same SIC code. To give just one example, UPS is defined as a trucking company while Federal Express is defined as an airline.

¹⁶ Compare *Dial-A-Mattress Franchise Corp. v. Page*, 880 F.2d 675 (2d Cir. 1989); and *Dranoff-Perlstein Assocs. v. Sklar*, 967 F.2d 852 (3d Cir. 1992).

¹⁷ See *PTO Examination Guide No. 1-94*, January 28, 1994.

The SIC classifications create additional problems. The company that holds an 800 number is not always the entity that uses the number. Some users have many subsidiaries in many markets, but all of the subsidiaries would be under one SIC. Competitive classifications, moreover, are not static. Companies may qualify for more than one code or the proper code may change over time as a company acquires other companies, merges, or offers new products and services. The SIC classifications cannot keep pace with the market. In sum, the SIC classifications are too unsophisticated to serve the Commission's purpose.

Miscellaneous Proposals -- The Notice presents three additional proposals: delayed assignment, gateway intercept, and SAC by service.

a. Delayed Assignment -- As discussed above, the Commission should at a minimum delay the assignment of sensitive 800 number equivalents in the 888 (and 8YY) SAC and assign non-equivalents first. Delayed assignment during the initial introduction period for 888 SAC¹ will reduce misdialed calls while the general dialing public becomes educated about 888.

b. Gateway Intercept -- The Notice requests comment on requiring carriers to provide a transitional gateway intercept during the change to a new toll free code. NPRM at ¶ 46. Most members of the calling public are likely to have some experience, and thus some familiarity, with gateway intercept services for Plain Old Telephone Service ("POTS"), e.g., the announcement that a called party's number has changed. Similarly, a gateway

intercept for numbers using new toll-free SACs could identify the called party to a caller who could then disconnect if the wrong SAC was used.

The Coalition supports gateway intercept as an *optional* method of protection against misdialed calls, but opposes mandatory gateway intercept services. In some cases, call interception could introduce significant post-dial delay that would erode the utility of an 800 service. In addition, call intercept announcements can be difficult to develop and could cause caller confusion for 800 users whose 800 numbers are assigned to subsidiaries that may or may not have the same corporate name. For some 800 customers, an intercept would only create a breeding ground for human error and oversight in the installation and maintenance of the proper message and transmission instructions. For these reasons, the Coalition supports call intercept *only* if it is optional.

SAC by Service

As discussed above, the Coalition strongly supports separation of SAC by service, combined with a right of first refusal. See Section B.1 above.

3. High Volume Numbers

The Notice separately addresses high volume numbers, *i.e.*, those numbers that carry large volumes of traffic, but are not necessarily “vanity”/mnemonic numbers.¹⁸ High volume numbers, as pointed out by the Coalition, however, face the same problems and need for protection that “vanity”

¹⁸ See NPRM ¶ 47.

numbers. The Coalition, accordingly requests that the Commission grant high volume numbers the same protections granted "vanity"/mnemonic numbers.

D. Public Awareness and Industry Participation

The Notice seeks comment on educational initiatives that may be required to fully inform the public about the introduction of new toll-free SACs. NPRM at ¶ 50. The Notice acknowledges the initiatives undertaken thus far by the Commission and the carriers. It seeks comment on whether additional efforts should be undertaken, who should conduct such public awareness efforts, who should pay for them, and what form such efforts should take.

The Coalition strongly supports an expanded, aggressive caller education campaign to acquaint the general public with the concept of toll-free numbers in addition to the 800 SAC.

Without adequate public education, the introduction of the new 888 SAC will produce caller confusion, misdialed calls, and costly disruption to existing 800 services. Currently, studies conducted by AT&T demonstrate that only 1 percent of the calling public recognize that 888 numbers are toll free.¹⁹ To respond to this problem, the Commission and certain members of the industry have begun a public education initiative. This initiative is a good start, but the Commission must ensure that additional efforts are undertaken to educate the public.

¹⁹ *AT&T Launches National Education Program to Introduce New 888 Toll-Free Prefix*, AT&T News Release (Aug. 16, 1995).

The Coalition urges the Commission to require all carriers to: (1) share in the costs of educating the public; (2) collectively conduct a multimedia campaign that covers all markets, not just the top 35 geographic markets; and (3) invest, at a minimum, the same resources in terms of media, scale, scope, and effort that local exchange companies historically use to introduce changes in local numbering plans.

Users like those who are members of the Coalition have and will contribute to this education effort through their marketing and customer service channels. But carriers are best positioned to educate the general public regarding changes in the delivery of telecommunications services.

FCC oversight is crucial here. Because carriers are typically paid (but not blamed) for misdialed calls, they have less incentive to invest in an education campaign to reduce misdials. The 800 Users Coalition urges the Commission to ensure that all carriers undertake and fund adequate efforts to assure that the public is fully informed about the introduction of new toll free dialing codes and misdialed calls.

CONCLUSION

The Commission must ensure that the quality and utility of toll-free service is preserved. To do so, the Commission must protect users' investment in toll free numbers and services by adopting the safeguards discussed above, including:

- Dedicating SACs to specific toll-free services.
- Granting existing 800 customers a right of first refusal with respect to the 8YY equivalents of users' sensitive 800 numbers.
- Requiring carriers to provide an optional call intercept service for users.
- Modifying the Commission's rules and the industry's Resp Org guidelines prohibiting number brokering to give a whistleblower the number held for unlawful ransom by a broker.
- Requiring all carriers to conduct expanded caller education programs.

These measures and related remedies described above will preserve and enhance the value of toll-free services while furthering the Commission's statutory and regulatory goals.

Respectfully submitted,



Colleen L. Boothby, Esq.
Laura F.H. McDonald, Esq.
Levine, Blaszak, Block & Boothby
1300 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20036